



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ELC CASE NO.348 OF 2016

ODOYO THADDAEUS ODOYO.....PLAINTIFF

VERSUS

HENRY ONYANGO OJWANG.....DEFENDANT

RULING

1. **Odoyo Thaddeaus Odoyo** the Plaintiff seeks to have **Henry Onyango Ojwang**, the Defendant cited for contempt and detained for a term not exceeding six months for blatantly disobeying the orders issued by the court on the 23rd February 2017. The Plaintiff also seeks to have the Defendant denied audience in this matter until and unless he purges the contempt of court committed herein and costs. The application is based on the ten grounds on its face and supported by the supporting affidavit sworn by the Plaintiff on the 20th July 2017. It is also supported by the further affidavit sworn by Amos Omondi Oloo, the Plaintiff's site agent on Land Reference Numbers 16609 (I.R. NO.179265), sworn on the 12th October 2017.

2. The application is opposed by the Defendant through grounds of opposition dated 6th October 2017 and his replying affidavit sworn on the same date.

3. The application came up for hearing on the 12th October 2017 when Mr. Odoyo and Mr. Kimanga, learned counsel for the Plaintiff and Defendant respectively, made then oral submissions.

4. The following are the issues for the courts determinations;

- a) Whether the order the Defendant is said to have disobeyed was brought to his attention, and if so, when.
- b) Whether the Defendant has disobeyed the said order and if so, whether he should be cited for competent.
- c) Whether the Defendant should be denied audience until he purges the contempt.
- d) Who pays the costs.

5. The court has carefully considered the grounds on the notice of motion dated 20th July 2017, the grounds of opposition, affidavit evidence by both sides, the submissions by counsel, the court record and come to the following determinations;

- (a) That the Plaintiff commenced this suit through the plaint dated 16th December 2016 seeking for

among others, mandatory injunction and eviction of the Defendant from Land Reference **Number 16609 (I.R. No.79265), Mambo Leo estate, Kisumu County**, hereinafter referred to as the suit land. The Plaintiff also filed the notice of motion dated 16th December 2016 seeking to restrain the “Defendant, whether by himself, his agents, servants, employees and/or assigns from building, constructing, letting, renting out, possessing, occupying or in any way dealing on or carrying out any activity on all that property known as Land Reference **Number 16609 (I.R. No. 179265) situate within Mambo Leo – estate – within Kisumu County**” first pending the hearing and determination of this application and secondly the hearing and determination of this suit.

(b) The application was fixed for hearing on the 23rd February 2017 and duly served on the Defendant, who entered appearance through the memo filed by M/S Baya & Co. Advocates dated 22nd December 2016, and filed on the 23rd December 2016. The Defendant also filed his replying affidavit sworn on the 18th January 2017.

(c) That on the 23rd February 2017, both parties were represented by counsel. That after counsel for the Plaintiff disclosed that they had filed another application seeking to strike out the Defendants pleadings which had not been served, and upon hearing counsel for the Defendant who did not oppose the interim orders being granted, the court allowed prayer 2 of the notice of motion dated 16th December 2016 pending hearing and determination of the application. The application dated 16th December 2016 and the other one for striking out the Defendant’s pleading were fixed for hearing by consent on the 30th May 2017.

(d) That on the 26th May 2017, the Defendant filed a notice to act in person of the same date. That when the matter came up for hearing of the two applications dated 16th December 2016 and 21st February 2017 on the 30th May 2017, the Defendant informed the court that he had commenced discussions with the counsel for the Plaintiff and requested for time to engage another counsel. The counsel for the Plaintiff confirmed having received some offer from the Defendant but requested for some time to await his client for instructions. The court placed the matter aside up to 10:15 A.M when both the Plaintiff and Defendant were present. The court after hearing counsel for the Plaintiff and the Defendant in person reminded the parties of the interim order of 23rd February 2017 and asked any of them who may have acted contrary to the order to purge the contempt in 14 days. The Plaintiff was also allowed to commence contempt proceedings after 14 days if the contempt will not have been purged. The applications were then rescheduled to 12th October 2017 and before that date, the Plaintiff commenced the contempt proceedings under the notice of motion dated 20th July 2017.

(e) That from the Plaintiff’s plaint at paragraph 13, the Defendant was going on with the finishing works and had rented out two units by the time this suit was filed. That fact was also restated at grounds (b) and (c) of the notice of motion dated 16th December 2016 and paragraphs 14 and 15 of the supporting affidavit sworn on the 16th December 2016. That the Defendant did not controvert or rebut those averments and deposition in his replying affidavit sworn on the 18th January 2017. That when the counsel for the Plaintiff raised the issue of disobedience of the court order on the 30th May 2017, the Defendant responded as follows;

- That he was present when the order was made on the 23rd February 2017.
- That he was occupying the premises with his family.
- That he has not rented out the premises.
- That he be given 14 days to purge the contempt.
- That he had commenced negotiations with the Plaintiff and did not need an advocate at that stage but would engage one if the negotiations fail.

(f) That by the notice of change of advocate dated 7th June 2017 and filed in court on the 8th June 2017, M/S Kimanga & CO. Advocate came on record for the Defendant.

(g) That the interim order issued on 23rd February 2017, and extended severally since then, restrains the Defendant by himself or others acting on his authority from “**building, constructing, letting, renting out, possessing, occupying or in any way dealing on or carrying out any activity**” on the suit land. That by what was disclosed and admitted by the Plaintiff through his pleadings and affidavit evidence, two tenants had been placed on the premises by the Defendant by the time this suit was filed. That by the Defendant’s own words on the 30th May 2017, he had also moved into the suit premise with his family which he admitted he knew was contrary to the court order of 23rd February 2017. That upon undertaking to purge the contempt in 14 days, the court did not issue any punishment at that stage but allowed the Plaintiff to move the court formally if the Defendant’s disobediences continues.

(h) That the Plaintiff has deponed that the Defendant has, after the order of 23rd February 2017, continued with the finishing works on the development on the suit property and has rented out additional units to tenants. The Defendant has in paragraph 6 and 11 of his replying affidavit sworn on 6th October 2017 confirmed that there are four tenants on the suit property. That in view of his address in court on the 30th May 2017 that there were no tenants on the suit land by then, the four must have come in after that date. The letting out of the units in the premises goes against the order of 23rd February 2017. The carrying out of finishing works also goes against the said order. The Defendant was given the opportunity to purge the contempt on 30th May 2017 in 14 days but has not done so. He deserves to be sanctioned.

(i) That the foregoing shows that the Plaintiff has established to the standard required that the Defendant has disobeyed the court order of 23rd February 2017 by letting out units in the suit land, continuing to be in possession of the suit premises by occupying it and carrying out finishing works. The Defendant is therefore in contempt of the court order.

6. That the Plaintiffs notice of motion dated 20th July 2017 has merit and is allowed as prayed with costs.

Orders accordingly.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

DATED AND DELIVERED THIS 6TH DAY OF DECEMBER 2017

In presence of;

Plaintiff Absent

Defendant Absent

Counsel M/s Bagwasi for Odoyo for Plaintiff

Mr. kimanga for the Defendant.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

6/12/2017

S.M. Kibunja Judge

Oyugi court assistant

Parties absent

M/s Bagwasi for Odoyo for Plaintiff/Applicant

Mr. Kimanga for Defendant/Respondent

Court: the ruling dated and delivered in open court in presence for M/S Bagwasi for Odoyo for Plaintiff and Mr. Kimanga for the Defendant.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

6/12/2017